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RICHMOND LEATHER MFG. CO. *v.* FAWCETT.

June 23, 1921.

[107 S. E. 800.]

**1. Sales (§ 416 (1)\*)—Testimony of Plaintiff Buyer as to Prior Correspondence between Parties Admissible.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's failure to deliver, testimony of the buyer as to correspondence between him and the seller prior to the making of the contract sued on held admissible.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 684.]

**2. Sales (§ 416 (1)\*)—Letter of One of Committee on Supplies of War Industries Board Admissible for Plaintiff Buyer of Shoe Laces.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's failure to deliver, a letter of one of the committee on supplies of the War Industries Board, Council of National Defense, was admissible for the buyer.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 763.]

**3. Sales (§ 416 (2)\*)—Evidence as to Plaintiff Buyer's Contracts of Resale Admissible.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, evidence as to plaintiff buyer's contract of resale for the laces covered by an order which was performed or discharged in full by defendant seller was immaterial, but evidence as to contracts of resale held by the buyer for laces covered by orders as to which the seller defaulted was admissible on the issue of damages; defendant seller having been aware that the purchases were made for resale.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 763.]

**4. Sales (§ 418 (3)\*)—Plaintiff Buyer Could Prove Market Price of Undelivered Goods on Market at Place of Delivery.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, with respect to undelivered laces covered by one of the orders, plaintiff buyer had the right to prove the market price of such laces in the city where the laces were to be delivered, for, if he was entitled to recover, the difference between the seller's price to him and the price at which the laces could have been resold on the market at such place of delivery, if delivered in due course, represented his damages.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 46.]

**5. Sales (§ 177\*)—Buyer May Cancel for Failure of Seller to Keep up Weekly Deliveries.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, instruction that, if the jury believed from the evidence that defendant seller agreed to fill plaintiff buyer's orders at the rate of 50,000 laces a week, be-

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ginning at a specified time, and failed to make deliveries as agreed, plaintiff buyer was justified in canceling the orders, the jury should find for him, and assess his damages in conformity with the directions of the court, held not erroneous.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 43.]

**6. Sales (§ 150 (1)\*)—Seller Was Bound to Deliver According to Contract.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, instruction that, whatever the contract between the parties relating to delivery, defendant seller was bound to deliver according to the terms of the contract, and if it failed to do so was liable in damages to plaintiff buyer, held proper.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 13, 14.]

**7. Sales (§ 81 (3)\*)—Purchase for Resale for Army Use, Delivery to Be Rushed, Required More than Delivery in Reasonable Time.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, instruction that, if the jury believed that defendant seller accepted an order, stipulating delivery was to be rushed, with knowledge that the laces were purchased for resale for army use, the provision as to delivery required more than that such laces should be sent within a reasonable time, and required delivery without delay except such as might be absolutely necessary in the usual course of defendant's business, held proper.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 25, 26.]

**8. Sales (§ 81 (6)\*)—Time May Be Made of the Essence Where Agreed Amount Deliverable at Fixed Time.**—Ordinarily, with respect to contracts for the sale and delivery of manufactured articles, time is not of the essence; but when, by contract one is entitled to deliveries in an agreed amount at a specified time, he is not compelled to accept a substituted performance.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 24.]

**9. Sales (§ 176 (6)\*)—Right to Delivery at Specified Time May Be Waived by Acceptance and Payment.**—Where a buyer entitled by his contract to deliveries in an agreed amount at a specified time does not stand upon his rights, but accepts a substituted performance and pays for same, a new status or relationship between the parties is created, and the buyer loses a measure of his rights by his voluntary action in this respect.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 39.]

**10. Estoppel (§ 52\*)—Waiver May Be either Express or Implied.**—Waiver applies to any right conferred by law or contract, and the

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

owner of such right can waive it expressly, either in writing or by parol, or impliedly, by inconsistent conduct.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 417, 418.]

**11. Estoppel (§ 52\*)—Waiver Requires No Consideration.**—An actual waiver is a completed performance, the doing of what one wills with his own, so that there is no question of consideration involved.

[Ed. Note.—For other cases, see 15 Va.-W. Va. Enc. Dig. 1060.]

**12. Sales (§ 127\*)—Right of Rescission for Delayed Deliveries May Be Lost So As to Require Notice before Rescission for Delay Is Permissible.**—A service of dealings in which delayed deliveries are accepted and paid for, and further deliveries demanded, justifies the party in default, in the absence of anything to the contrary, in concluding that the contract will not be rescinded on account of such delayed deliveries without notice; for in such case rescission without notice on account of delay in delivery would be in derogation of the accustomed course of dealing between the parties.

**13. Sales (§ 121\*)—By Waiver of Breach Contract Kept Alive for Both Parties.**—If failure to deliver according to contract terms gives the right to rescind, acceptance of a delayed delivery and payment therefor, standing alone, is a waiver of the right and an election to hold the seller to his contract, and by such waiver, the buyer keeps the contract alive against the seller, but he also keeps it alive in the seller's favor and against himself, and neither can sue save for a breach thereafter occurring.

**14. Sales (§ 176 (1)\*)—Seller Whose Breach Is Waived May Take Advantage of a Subsequent Breach by Buyer.**—Where the breach by the seller is waived by the buyer, this enables the seller not only to complete the contract, if so advised, notwithstanding his previous default, but also to take advantage of any supervening circumstances which would justify him in declining to complete.

**15. Sales (§ 404\*)—On Seller's Default Buyer May Sue or Waive Breach.**—On default by the seller, the buyer may stand on his legal rights, treat the contract as ended, and sue the seller for damages, or he can accept the delayed delivery, pay for same, and thereby keep the contract alive, alike for himself and the seller.

**16. Sales (§ 421\*)—Instruction Should Have Been Given at Defendant Seller's Request Defining Waiver by Buyer of Time for Delivery.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, plaintiff buyer having throughout accepted delayed shipments though insisting on his right to prompt performance, held, that an instruction should have been given defining waiver, how affected, and its consequences, and instructing the jury as to their duty should they determine from the evidence that a

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

waiver by plaintiff buyer of the times specified for delivery. had actually taken place.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 704.]

**17. Release (§ 7\*)—Understanding between Parties Held Not to Constitute Undertaking of Buyer Not to Sue.**—Where the buyer of leather shoe laces, on the seller's failure to make installment deliveries promptly, insisted on his right to such prompt deliveries, and the seller said that, if the buyer had any intention to sue, he, the seller, preferred to stop there and meet the issue immediately, and the buyer said he had no intention to sue, so that deliveries by the seller continued, there was no enforceable undertaking on the part of the buyer not to sue, though all that passed in that connection between the parties could be considered by the jury in determining the matter of waiver by the buyer of time for deliveries.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 791.]

Error to Circuit Court of City of Richmond.

Motion for judgment by Frederick J. Fawcett against the Richmond Leather Manufacturing Company. Judgment for plaintiff, and defendant brings error. Judgment set aside, and new trial awarded. Reversed.

*Scott & Buchanan* and *D. H. Leake*, all of Richmond, for plaintiff in error.

*Munford, Hunton, Williams & Anderson*, of Richmond, for defendant in error.

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BROWN v. COMMONWEALTH.

June 29, 1921.

[107 S. E. 809.]

**1. Homicide (§ 100\*)—Defendant Held Guilty as a Principal in Second Degree of Shooting with Intent to Kill.**—Where defendant accompanied by two companions, went to the house of the prosecuting witness with the intention to fight such witness if he found that he was in the right as to a certain transaction, without defendant knowing that one of the companions was armed, and where during the fight that ensued one of his companions shot the prosecuting witness, the defendant was guilty as a principal in the second degree of unlawfully, maliciously, and feloniously shooting the prosecuting witness with intent to maim, disfigure, disable, and kill him, even though prior to the fight the defendant or his companion had no intention to shoot.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 148.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.